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10/661,411

09/12/2003

Gary A. Snyder

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EXAMINER

CHAWLA, JYOTI

ART UNIT

PAPER NUMBER

1794

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/661,411	<b>Applicant(s)</b> SNYDER, GARY A.	
	<b>Examiner</b> JYOTI CHAWLA	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 11 November 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 15-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on November 11, 2008 has been entered. Claims 15 and 20 have been amended. Claims 15-24 are pending and are examined in the application.

### ***Claim Rejections - 35 USC § 112(first paragraph)***

Rejection of claims 15-24 made in the previous office action under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement have been withdrawn based on applicant's amendments and response.

### ***Claim Rejections - 35 USC § 112 (Second Paragraph)***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Rejection under 112(second paragraph) for claim 20-21 for the recitation of the phrase "cold storage" has been withdrawn in light of applicant's amendment of 11/11/08.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

Determining the scope and contents of the prior art.  
Ascertaining the differences between the prior art and the claims at issue.  
Resolving the level of ordinary skill in the pertinent art.  
Considering objective evidence present in the application indicating obviousness or nonobviousness.

(A) Rejection of claims 15-24 made in the previous office action under 35 U.S.C. 103(a) as being unpatentable over Shillington et al (US 3533810), in view of the combination of Gross (US 3071474) and methyl anthranilate by www.thegoodscentcompany.com has been withdrawn based on applicant's amendments.

(B) Rejection of claims 15-24 made in the previous office action under 35 U.S.C. 103(a) as being unpatentable over Weaver (US 3669684) in view of the combination of Kare (US 2967128), Michael (US 3427167) and Gross (US 3071474) has been withdrawn based on applicant's amendment.

C) Claims 15-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weaver (US 3669684) in view of the combination of Arctander (Methyl Anthranilate), Gross (US 3071474), Klopping (US 4060625) and Apple Storage Technologies Article, hereinafter Apple Article.

Regarding claims 15-18 and 20, 22-23, Weaver teaches of imparting flavor to already existing food or food ingredient without changing the texture or essential chemical nature. Weaver further teaches that foods to which flavor can be imparted includes basic raw or fresh foods, such as, vegetables, fruits, nuts and eggs (Column 1, lines 25-31). Weaver specifically teaches apples and pears, i.e., pome fruits, after they have been harvested, as instantly claimed (columns 5-6, Examples 6-7, and 12-13). Pome fruits, such as apples and pears have a mesocarp that is surrounded by pericarp, and the pericarp includes an exocarp as instantly recited. Weaver also discloses "a process

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whereby a given food in its natural state may have imparted to it a flavor of another food, such that the single natural food will itself contain the **blended flavors**" (Column 1, line 64 to Column 2, line 3). Weaver subjects the food to a desired flavor-imparting ingredient, such as, the flavor essence or concentrates (Column 2, line 60 to Column 3, line 10). Weaver discloses of exposing the whole natural foods, such as, uncut and unpeeled fruits (apples and pears), vegetables and eggs etc., to desired flavors (Columns 3-6), as recited in claims 16-18, 22-23. Weaver also teaches imparting flavors to pears and apples (Column 5 and 6, examples 6, 7, 12 and 13), which includes exposing apples to grape flavor (Column 5, Example 7, item 2) as recited by the applicant. In the results Weaver discloses "b", i.e., substantial odor and flavor was absorbed and in Quality weaver's results indicate "XXX", i.e., Superb quality and strength of flavor. Thus, Weaver teaches of imparting flavors to pome fruits, especially to pears and apples. More specifically Weaver teaches that imparting grape flavor to pome fruits (apples) was known in the art at the time of the invention.

Weaver is silent about the composition of the grape flavor. However, Arctander teaches that methyl anthranilate has been used in production of grape flavor for foods to impart or enhance the grape flavor of food products such as candy and other consumer products etc. (Columns 1 and 2, page 52). Gross teaches of recovering methyl anthranilate from grapes as a volatile flavor compound. According to Gross methyl anthranilate represents characteristic grape flavor (Column 7, lines 10-22). Thus, grape flavors comprising a concentration of methyl anthranilate were known and available at the time of the invention. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Weaver and use a grape flavor comprising a concentration of methyl anthranilate at least for the reason of imparting characteristic grape flavor to the pome fruits (apples).

Weaver uses the term "migrator" for the flavor imparting component which may consist of aroma, a precursor, a flavor essence or concentrate. Among the methods of obtaining the flavored foods, Weaver discloses that basic food and migrator may be disposed together in a closed chamber until the desired penetration has been achieved or basic food may be placed on trays, which are introduced into a chamber containing

the migrator (i.e., dipping food in migrator) (column 2, line 66 to Column 3, line 35). Further, dipping to coat a fruit or vegetable was well known at the time of the invention. Kloppe discloses application of protective compounds by dipping to post harvest fruit prior to storage and shipment (Column 6, lines 3-5). Thus, it would be obvious for one of ordinary skill in the art at the time of the invention to modify Weaver and introduce the grape flavor comprising methyl anthranilate by dipping the post harvest fruit in the grape flavoring to coat the post harvest fruit. One would have been motivated to substitute one art recognized method of coating fruit for another (i.e., dipping ) in producing grape flavored pome fruit of Weaver at least for the reason of availability and affordability of equipment used at the time the invention was made. Applicant is further reminded that a recitation of the method of making the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. Thus, the claimed invention would have been obvious over modified Weaver, absent any clear and convincing evidence and/or arguments to the contrary.

Regarding the limitation of storage temperature as recited in independent claims 15 and 20, "post harvest fruit that is at approximately 35°F" (claim 15) and "storing the grape flavored pome fruit at approximately 35°F" (claim 20), Weaver teaches of treating the foods to enhance the flavor at various temperatures, such as 40°F and 70°F etc., depending on the storage need of the food (See examples 1-6). Thus it was known to store fruit in a refrigerated storage at the time of the invention. The reference however is silent as to the specific range of temperature that is suitable for storage of pome fruits. However, Apple Article discloses that typical cold storage temperature for apples is 32°F (approximately 35°F), which falls in applicant's recited temperature range for claims 15 and 20. Thus, refrigerated storage for post harvest apples (pome fruits) with temperature in the recited range of the applicant was known in the art at the time of the invention. Therefore, it would have been obvious for one of ordinary skill in the art at the time of the invention to modify Weaver in view of Apple Article and store the grape flavored apples of Weaver in refrigerated storage at approximately 35°F. One would have been motivated to store the apples (pome fruit) in refrigerated storage at least for

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the purpose of increasing the storage life of apple (pome fruit), and also to slow down the ripening process.

Regarding claims 19 and 24, Shillington teaches of Methyl anthranilate, however the reference does not teach that the compound is derived from grapes, however methyl anthranilate was known to be obtained from grapes at the time of the invention, as also disclosed in applicant's specification under Background art. Gross teaches that methyl anthranilate can be derived from grape and is an important compound found in fresh grape juice that is responsible for the characteristic fresh grape juice flavor and aroma in food (Column 2, lines 33-69). Thus, methyl anthranilate derived from grape was known and available at the time of the invention and to include methyl anthranilate from any available source would be a matter of routine determination for one of ordinary skill in the art at the time of the invention. One of ordinary skill would have been motivated to modify Weaver and choose methyl anthranilate obtained from grapes (as taught by Gross) at least for the purpose of using a natural, less expensive, or less processed compound as compared to methyl anthranilate from other sources.

Regarding claim 21, Weaver does not specify the storage life of the flavored fruit, However, Apple Article discloses that in United States the harvested apples are rushed to cold storage and are stored till late January to early February (page 1). Further, it is noted that in the United States apples are typically harvested in October, which makes the storage life of apples stored at approximately 35°F to be more than one month, which includes the time period recited by the applicant. Thus, storing pome fruits, such as apples, in the temperature range recited by the applicant for a period recited by the applicant was known at the time of the invention. Further, the storage life and flavor retention of flavor enhanced fruits will depend on several factors, such as, the concentration of flavor (methyl anthranilate), storage conditions, e.g., is the fruit packaged individually or groups, package size and package material, storage atmosphere, temperature etc. Since the applicant has not recited any conditions other than temperature, therefore, it would be obvious to one of ordinary skill in the art at the time of the invention that under similar conditions of storage and packaging, the fruit

treated with admixtures comprising comparable concentration of methyl anthranilate, as the instantly claimed invention, the fruits and vegetables of modified Weaver, stored at approximately 35°F (as recited by Apple Article) will be able to retain the grape flavor (of methyl anthranilate) for a time period that is comparable to the time period as claimed in the instant invention (i.e., at least for over a period of one month), absent any clear and convincing arguments and/or evidence to the contrary.

Therefore, claims 15-24 are rejected under 35 U.S.C. 103(a) as being obvious over Weaver in view of the combination of Michael, Gross, Klopping and Apple Article.

(D) Claims 15-18 and 20, 22-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shillington et al (US 3533810), hereinafter Shillington, in view of the combination of Arctander, Askham (US 5296226) and Apple Storage Technologies Article, hereinafter Apple Article (All references already of record).

Shillington teaches application of a composition comprising methyl anthranilate to post harvest fruits and vegetables (Column 1, lines 15-35) and specifically to pome fruits such as apples and pears (Column 4, lines 73-75 and Example 8) as recited by the applicant in claims 15 and 20. Shillington teaches of treatment of fruits and vegetables in general however, examples 6-8 in Column 4, specifically teach the process of treatments and the fruits and vegetables, such as, apples and pears, i.e., pome fruits, as recited by the applicant in claims 16-18 and 22-23. Pome fruits, such as apples and pears have a mesocarp that is surrounded by pericarp, and the pericarp includes an exocarp as instantly recited Shillington teaches application of a methyl anthranilate containing composition to unpeeled whole fruits and vegetables by coating the surface of the whole fruit by dipping or immersing the whole fruit in the composition (Column 2, lines 43-61 and column 4, lines 57-75) as recited by the applicant in claims 15, 18 & 20.

Shillington is silent about methyl anthranilate imparting grape flavor to the fruit. However, Methyl anthranilate has been known in the art to have an inherent property of imparting a grape odor and flavor to compositions (foods, beverages, perfumes) to



which it is added, as disclosed by Arctander (pages 51 and 52). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention that addition or application of an admixture comprising methyl anthranilate to fruits (including pome fruits, such as, apples and pears), as taught by Shillington in Example 8, will result in imparting grape flavor to the fruit.

Shillington teaches of application of methyl anthranilate to the pericarp/exocarp of the fruit. Regarding the presence of the compound in the mesocarp of the fruit or vegetable, Shillington teaches that application of methyl anthranilate containing composition enhances the aroma of the created product (Column 2, lines 26-28 and Column 3, lines 1-7). It is noted that methyl anthranilate can enter the plant material through the interspatial pores of epidermal cell walls as well as through stomatal pores and guard cells (Askham column 4, line 67 to column 5, line 5). Thus, methyl anthranilate applied to fruits as an admixture, as taught by Shillington, will behave similarly and enter the plant tissues when applied to post-harvest pome fruit. Therefore, it would be expected that pome fruits (apples and pears) as taught by Shillington, will possess enhanced aroma characteristic of methyl anthranilate (grape) due to the effect of the surface application of an admixture comprising methyl anthranilate, i.e., the presence of grape flavor in the mesocarp of the fruit, will be similar to the grape flavor in the instantly claimed invention. Thus Shillington teaches of the presence of methyl anthranilate (i.e., grape flavor) in the fruit as recited by the applicant in claims 15-18 and 20, 22-23.

Regarding the limitation of storage temperature as recited in independent claims 15 and 20, "post harvest fruit that is at approximately 35°F" (claim 15) and "storing the grape flavored pome fruit at approximately 35°F" (claim 20), Shillington teaches application of admixture comprising methyl anthranilate at ambient temperature (Column 1, lines 22-23). The reference however is silent as to the specific range of temperature that is suitable as ambient temperature for the storage of the fruit or vegetable products. However, Apple Article discloses that typical cold storage temperature for apples is 32°F (approximately 35°F), which falls in applicant's recited

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temperature range for claims 15 and 20. Thus, refrigerated storage for post harvest apples (pome fruits) with temperature in the recited range of the applicant was known in the art at the time of the invention. Therefore, it would have been obvious for one of ordinary skill in the art at the time of the invention to modify Shillington in view of Apple Article and store the methyl anthranilate coated apples of Shillington at approximately 35°F (i.e., refrigerated storage). One would have been motivated to store the apples (pome fruit) in refrigerated storage at least for the purpose of increasing the storage life of apple (pome fruit), and also to slow down the ripening process.

Regarding claim 21, Shillington provides data that the fruits and vegetables remain fresh for at least 10-14 days (Columns 5-6 and tables 1 and 2) but the reference is silent regarding the storage temperature. However, Apple Article discloses that in United States the harvested apples are rushed to cold storage and are stored till late January to early February (page 1). Further, it is noted that in the United States apples are typically harvested in October, which makes the storage life of apples stored at approximately 35°F to be more than one month, which includes the time period recited by the applicant. Thus, storing pome fruits, such as apples, in the temperature range recited by the applicant for a period recited by the applicant was known at the time of the invention. Further, the applicant has not recited variables, such as, the concentration of methyl anthranilate (grape flavor) in the coating admixture, the specific storage conditions under which the pome fruit is stored, e.g., is the methyl anthranilate treated fruit packaged before storing or is the fruit stored in cold storage or controlled atmosphere cold storage. Therefore, it would be obvious to one of ordinary skill in the art at the time of the invention that under similar conditions of storage and packaging, the fruit treated with admixtures comprising comparable concentration of methyl anthranilate, as the instantly claimed invention, the fruits and vegetables of Shillington, stored at approximately 35°F (as recited by Apple Article) will be able to retain the grape flavor (of methyl anthranilate) for a time period that is comparable to the time period as claimed in the instant invention (i.e., at least for over a period of one month), absent any clear and convincing arguments and/or evidence to the contrary.

Therefore, claims 15-18, 20-23 are obvious over Shillington in view of the combination of Arctander, Askham and Apple Article.

(E) Claims 19 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shillington, in view of the combination of Arctander, Askham and Apple Article, further in view of Gross (US 3071474).

Shillington, in view of the combination of Arctander, Askham and Apple Article has been applied to claims 15-18 and 20, 22-23 under 35 U.S.C. 103(a) in the office action above.

Regarding claims 19 and 24, Shillington teaches of Methyl anthranilate, however the reference does not teach that the compound is derived from grapes, however methyl anthranilate was known to be obtained from grapes at the time of the invention, as also disclosed in applicant's specification under Background art. Further, Arctander discloses that methyl Anthranilate naturally occurs in concord grapes. Regarding the recovery of methyl anthranilate from grapes, Gross teaches that methyl anthranilate can be derived from grape and is an important compound found in fresh grape juice that is responsible for the characteristic fresh grape juice flavor and aroma in food (Column 2, lines 33-69). Thus, methyl anthranilate derived from grape was known and available at the time of the invention and to modify Shillington to include methyl anthranilate obtained from a specific source (grapes) would be a matter of routine determination for one of ordinary skill in the art at the time of the invention. One of ordinary skill would have been motivated to choose methyl anthranilate obtained from grapes (as taught by Gross) at least for the reason of using a natural, less expensive source for a compound as compared to methyl anthranilate from other sources.

Therefore, claims 19 and 24 are obvious over Shillington in view of the combination of Arctander, Askham and Apple Article, further in view of Gross.

***Response to Arguments***

Applicant's arguments filed November 11, 2008 have been fully considered but are moot but are moot in view of the new ground(s) of rejection.

Applicant's remarks regarding rejections made under 35 USC 112 have been considered and responded in the office action above.

1) Regarding specific arguments pertaining to the references, the applicant arguments are directed to the newly added limitation of temperature (Remarks, page 5, paragraph 2), which has been addressed in the rejections above.

2) Applicant's arguments that "Weaver does not teach using methyl anthranilate" and weaver does not teach dipping the fruit as provided in claims 20-24" have been considered and responded in the rejection above. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

3) Declaration by Mr. Todd Snyder dated 11/11/2008 claiming commercial success, has been fully considered and has not been found persuasive.

With respect to the sales and argument of **commercial success**, it is not clear if the claimed invention resulted in the commercial success or whether other factors contributed to the success, such as increase advertising/marketing. The new declaration of Mr. Snyder provides the advertising figures for 2007-2008 along with the sales figures starting 2004-05 season, which have already been discussed in response to Mr. Snyder's earlier declaration of 2/25/08 in the Final office action dated 6/12/08.

The advertising data for the year 2007-08 season provided in the new declaration does not provide any more information about the reason of sales increase than the previous declaration. There is no comparative data provided to establish that the increase in sale

from 2005-06 to 2006-07 and then 2007-08 was solely based on the claimed invention and no other factors contributed to this increase in sales of grape flavored apples. Therefore, the new declaration by Mr. Snyder dated 11/11/2008, has not been found persuasive. Further, it is noted that "In considering evidence of commercial success, care should be taken to determine that the commercial success alleged is directly derived from the invention claimed, in a marketplace where the consumer is free to choose on the basis of objective principles, and that such success is not the result of heavy promotion or advertising, shift in advertising, consumption by purchasers normally tied to applicant or assignee, or other business events extraneous to the merits of the claimed invention, etc" (In re Mageli, 470 F.2d 1380, 176 USPQ 305 (CCPA 1973)).

Applicant's arguments and declaration filed November 11, 2008 (pages 4-7) have been fully considered but have not been found persuasive. Regarding specific arguments regarding the references, the applicant is referred to the office action above.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on (571) 272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JC/  
Examiner  
Art Unit 1794

/JENNIFER MCNEIL/  
Supervisory Patent Examiner, Art Unit 1794